In the

Supreme Court of the United States

October Term, 1965

No. 69

LEVIN NOCK DAVIS, SECRETARY, STATE BOARD OF ELECTIONS, ET AL.,
Appellants,

v.

HARRISON MANN, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria

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REPLY BRIEF ON BEHALF OF APPELLANTS

PRELIMINARY STATEMENT

For the reasons stated in their opening brief, elaboration of which is made in this reply brief, appellants reaffirm their position that the decision of the court below should be reversed and the cause remanded to the District Court with instructions to (1) dismiss the complaint on the merits or (2) in the alternative, to abstain from conducting further proceedings pending decisions of the case of *Tyler* v. *Davis* by the Supreme Court of Appeals of Virginia.

ARGUMENT

I.

The Doctrine of Abstention May Be Applied in Apportionment Cases and Should Be Applied Under the Facts and Circumstances of This Case

The majority of the court below, in the opinion by Albert V. Bryan, Circuit Judge, stated that there was no precedent for abstention in the circumstances of this case, but the dissenting judge pointed to the concurring opinion of Mr. Justice Clark in *Baker* v. *Carr*, 369 U. S. 186, wherein it was said at pp. 258-259:

> "* * * Although I find the Tennessee apportionment statute offends the Equal Protection Clause, *I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee.* But the majority of the people of Tennessee have no 'practical opportunities for exerting their political weight at the polls' to correct the existing 'invidious discrimination.' Tennessee has no initiative and referendum. I have searched diligently for other 'practical opportunities' present under the law. *I find none other than through the federal courts.* The majority of the voters have been caught up in a legislative strait jacket. Tennessee has an 'informed civically militant electorate' and 'an aroused popular conscience,' but it does not sear 'the conscience of the people's representatives.' This is because the legislative policy has rivited the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented. *The people have been rebuffed at the hands of the Assembly; they have tried the constitutional convention route, but since the call must originate in the Assembly it, too, has been fruitless. They have tried Tennessee courts with the same result,* and Governors have fought the tide only to flounder. * * *" (Italics supplied)

See, also, McCloskey: Forward—The Reapportionment Case, 76 Harv. L. Rev. 54, 73.

The question of reapportionment of state legislatures is one of supreme sensitivity and intervention by the federal courts should not be considered except as a last resort. As previously pointed out in the appellants' opening brief, the appellees have an adequate remedy in the state courts and, in fact, such remedy has been invoked by certain individuals similarly situated to the appellees.[1] Thus, under the facts and circumstances surrounding this case, to employ federal equity jurisdiction and the extraordinary remedy of injunction in so delicate a field is to create needless friction with state policy and should have been avoided by the court below in the exercise of its discretion.

The dissenting judge in the court below also found that numerous cases had sanctioned abstention on the grounds of comity in order to avoid needless friction with state policies. It is respectfully submitted that such cases are applicable here.

Intervention by the federal courts in cases involving apportionment statutes is analogous with the exercise of federal equity jurisdiction in cases involving the enforcement of state criminal laws, and the same result, namely abstention, should be reached in both instances. Surely it must be said that the independence of a state government depends as much upon the right to have state courts initially pass upon an apportionment statute as it does upon the right to have state courts enforce a criminal law.

As late as June 17, 1963, this court affirmed, *per curiam*, an appeal from a decision of a three-judge court in the

[1] See letter-opinion of the Judge of the Circuit Court of the City of Richmond, dated September 19, 1963, in *Tyler* v. *Davis*, Chancery Docket No. 7946-C, attached as Appendix I, and order of October 11, 1963, entered pursuant thereto and attached as Appendix II to this reply brief.

United States District Court for the Eastern District of Virginia, dismissing a complaint for declaratory judgment and injunctive relief under the Civil Rights Acts. *Robinson* v. *Hunter*, 374 U. S. 488; *sub nom., Henderson* v. *Trailway Bus Company*, 194 F. Supp. 423 (1961).

In the *Henderson* case, *supra*, the plaintiffs had been threatened with prosecution under the criminal trespass statutes of Virginia. The three-judge court, in its opinion by Albert V. Bryan, then District Judge, held that there were no unusual circumstances to justify a federal court's interference and that irreparable injury to the plaintiffs through submission of their federal contentions to the state courts was not demonstrated (194 F. Supp. at p. 427).

Just as in *Henderson* v. *Trailway Bus Company, supra*, there are no unusual circumstances in this case to justify intervention by the federal court below. The appellees will suffer no irreparable injury by the Court's applying the doctrine of abstention. The members of the House of Delegates of Virginia are elected on the Tuesday succeeding the first Monday in November in the odd years, for a two-year term to begin on the second Wednesday in January succeeding their election. See Section 24-11 of the Code of Virginia, as amended. Section 24-13 of the Code of Virginia provides that the members of the Senate shall be elected on the Tuesday succeeding the first Monday in November in 1951 and every four years thereafter, for a term of four years to begin on the second Wednesday in January succeeding their election. Thus, it can be seen that there is no real urgency, since no court decision can affect the membership of the House of Delegates until January, 1966, or of the Senate of Virginia until January, 1968.

As to producing long delays,[2] the appellees now have a vehicle upon which they may travel with deliberate speed—the case of *Tyler* v. *Davis, supra,* which is now ripe for appeal to the Supreme Court of Appeals of Virginia.

Again, wherein is the urgency which demands intervention into so delicate a field of state government? This is not a case wherein the appellees have been incarcerated or have been threatened with loss of their personal liberty. This is not a segregation case wherein the appellants have been charged with discrimination because of race. Compare *McNeese* v. *Board of Education,* 373 U. S. 668 (1963), wherein this court held that the plaintiffs did not have to exhaust the administrative remedies provided by Illinois law in segregation cases, and pointed out that the right alleged by the plaintiffs "is as plainly federal in origin and nature as those vindicated in *Brown* v. *Board of Education,* 347 U. S. 483."

The issues before the court in this particular case are ones of first impression. There have been no decisions of this court, with which the appellants are familiar, that have held that the doctrine of abstention should not be applied in apportionment cases. Furthermore, under the particular facts and circumstances in *this* case, the decisions of the federal district courts on the question of the constitutionality

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[2] The Solicitor General seems to argue on page 18 of his brief *amicus curiae* that abstention should not be applied since it produces long delays. If this argument is followed, it would appear that the doctrine of abstention would have to be repudiated. Some delay is unavoidable and it would be a most difficult task to determine how long is a long delay for the purposes of knowing whether the doctrine of abstention should be applied or should not be applied. See, *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168, 172, 173.

In this connection, it should be noted that the Solicitor General is in error when he states in footnote 5 of his brief that this court ultimately reversed and held unconstitutional a statute that was before it in *Harrison* v. *NAACP,* 360 U. S. 167. See, *NAACP* v. *Button,* 371 U. S. 415, footnotes 1 and 2.

of apportionment statutes are not controlling if, indeed, material.

The majority opinion of the court below, merely stated that the strong implication of *Baker* v. *Carr, supra,* was that federal three-judge courts should resolve this type of litigation, ignoring Mr. Justice Clark's concurring opinion and citing only *Toombs* v. *Fortson,* 205 F. Supp. 248 (N.D. Ga. 1962). In answer, it seems necessary only to quote Walter E. Hoffman, District Judge, in his dissenting opinion wherein it was said:

> "* * * Since *Baker* v. *Carr* there have been only two cases from which it appears that the doctrine of abstention was affirmatively raised, where the court declined to abstain. In *Toombs* v. *Fortson,* 205 F. Supp. 248, a three-judge federal court in Georgia elected to dispose of the entire case without 'leaving part of it in limbo pending a later decision by a State Court.' Such is not this case. I do not agree with that portion of the opinion in *Toombs* v. *Fortson* which intimates that *Baker* v. *Carr* has held that the doctrine of abstention should be ignored in apportionment cases. Likewise in *Sanders* v. *Gray,* D.C., 203 F. Supp. 158, a three-judge federal court in Georgia, composed of two of the three judges sitting in *Toombs,* held that there was no adequate state remedy in view of the holding of the Supreme Court of Georgia in *Cox* v. *Peters* (1951), 208 Ga. 498, 67 S. E. 2d 579.
>
> "Unlike *Lisco* v. *McNichols,* D.C., 208 F. Supp. 471, where the General Assembly of Colorado had repeatedly refused to apportion in accordance with the Colorado Constitution, Virginia has reapportioned at ten year intervals as required by the bare wording of her Constitution. To prevent a multitude of actions which will undoubtedly result following any hasty reapportionment at any extra session of the General Assembly of Virginia, the entire matter may be resolved by retaining jurisdiction and relegating the parties to the

state court for a decision under Virginia's Declaratory Judgment Act.

"Wisconsin, a state which claims greater proportionate representativeness than Virginia, has been involved in recent apportionment litigation. *Wisconsin* v. *Zimmerman*, 209 F. Supp. 183. Expressing a reluctance to enter orders or directives in such a case, the three-judge federal court dismissed the action without prejudice to the rights of plaintiffs to again file suit after August 1, 1963. The court noted that a great disparity in population did exist, although not comparable with Tennessee. The action by the federal court in Wisconsin was taken despite the fact that (1) the Wisconsin Supreme Court 'had again denied relief,' (2) the 1961 legislature did not comply with the requirements of the state constitution, (3) the 1962 special session did nothing to afford relief, and (4) the next session of the legislature would not convene until January, 1963. * * *" (213 F. Supp. 590-591)

See also, *Lein* v. *Sathre*, 201 F. Supp. 535 (D.N.D., 1962); *League of Nebraska Municipalities* v. *March*, 209 F. Supp. 189 (D.Neb., 1962); and *Davis* v. *Synhorst*, 217 F. Supp. 492 (D.S.D. Iowa, 1963), wherein three-judge courts in apportionment cases withheld decisions on the merits.

The Solicitor General has stated in his brief that there is no serious doubt about the validity of Virginia's apportionment under the Constitution of Virginia (p. 17); that the Virginia Constitution contains no standards (p. 25) and that there is no apparent ground upon which the apportionment statutes could be held invalid under the Virginia Constitution (p. 22).

The majority of the court below stated that "there is little doubt that in Virginia population is the overriding consideration in any distribution of representatives" (*Mann* v. *Davis*, 213 F. Supp., at p. 584). If this be true, the Supreme Court of Appeals of Virginia could conceivably hold that

Sections 24-12 and 24-14 of the Code of Virginia violate Section 43 of the Constitution of Virginia. As a matter of comity, in order to avoid "needless friction with state policies," the state courts should first be allowed to determine this question.

As to other provisions of the Virginia Constitution which could conceivably invalidate the apportionment statutes, the appellants refer particularly to Sections 1 and 63[3] and respectfully submit that the Constitution of Virginia does guarantee the rights of citizens of Virginia and the equal protection of laws. See, *Taylor* v. *Smith*, 140 Va. 217, 232; *Gruber* v. *Commonwealth*, 140 Va. 312, 318; *Young's Case*, 101 Va. 853, 862, 863; *Avery* v. *Beale*, 195 Va. 690, 701; and *Brooks Transp. Co.* v. *Lynchburg*, 185 Va. 135, 142.

To conclude in the language of the dissenting judge:

> "I agree that there is no ambiguity in the particular statutes under consideration and they are not in need of interpretation *per se*. As construed in conjunction with Sections 41, 42 and 43 of the Virginia Constitution, a state court determination will, at the very least, furnish a guide for future action. I cannot agree that we should disregard the doctrine of abstention merely because the subject matter of the inquiry lies within the competence of a federal court sitting in Virginia; nor do I believe that ambiguity and need for interpre-

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[3] Section 1 of Virginia Constitution reads as follows:

> "That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

Section 63(18) of the Virginia Constitution provides that:

> "The General Assembly shall not enact any local, special or private law * * * granting to any * * * individual any special right, privilege or immunity."

tation constitute the only basis for restoring to abstention. There are numerous cases where abstention has been sanctioned on grounds of comity with the States in order to avoid a result in 'needless friction with State policies.' Railroad Com. of Texas v. Pullman Co., 312 U. S. 496, 61 S. Ct. 643, 85 L. Ed. 971; Pennsylvania v. Williams, supra. That the United States Supreme Court favors the doctrine of abstention is apparent from its more recent decisions. Harrison v. NAACP, 360 U. S. 167, 79 S. Ct. 1025; 3 L. Ed. 2d 1152; Louisiana Power & Light Co. v. Thibodaux, 360 U. S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058; Martin v. Creasy, 360 U. S. 219, 79 S. Ct. 1034, 3 L. Ed. 2d 1186. Of the four cases decided on June 8, 1959, involving the doctrine of abstention, only the County of Alleghany v. Frank Mashuda Co., 360 U. S. 185, 79 S. Ct. 1060, 3 L. Ed. 2d 1163, did the Supreme Court reject abstention and the initial paragraph of the opinion pointedly suggests the case *'would not entail the possibility of a premature and perhaps unnecessary decision of a serious federal constitutional question, would not create the hazard of unsettling some delicate balance in the area of federal-state relationships, and would not even require the District Court to guess at the resolution of uncertain and difficult issues of state law.'"* (213 F. Supp. 590)

II.

Sections 24-12 and 24-14 of the Virginia Code Are Not Violative of the Fourteenth Amendment to the Constitution of the United States

As Mr. Justice Clark in *Baker* v. *Carr*, 369 U. S. 186, 251-252, so counsel for appellants take the law applicable to the case at bar from *MacDougall* v. *Green*, 335 U. S. 281, 283-284, in which case this Court declared:

> *"To assume that political power is a function exclusively of numbers is to disregard the practicalities of government.* Thus, the Constitution protects the interests of the smaller against the greater by giv-

> ing in the Senate entirely unequal representation to populations. *It would be strange indeed, and doctrinaire, for this Court,* applying such broad constitutional concepts as due process and equal protection of the laws, *to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses,* in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. *The Constitution—a practical instrument of government—makes no such demands on the States.*" (Italics supplied)

As Mr. Justice Stewart in *Baker, supra* at 265-266, counsel for appellants understand that the above-quoted principles constitute "settled precedents," which were left wholly undisturbed by this Court's opinion in *Baker* and which govern any consideration of the constitutional validity of State legislative reapportionments.

Of course, the Solicitor General of the United States finds no comfort whatever in the settled law, for the *per capita* postulates he espouses cannot possibly be squared with "the law of the case" as stated in *Baker, supra* at 251. It is not surprising therefore that (1) in the government's compendious brief in the Maryland case,[4] the Solicitor General casually asserts that the principles in question have no application to cases involving the reapportionment of State legislatures, despite their quotation by Justices Clark and Stewart in *Baker* (2) in the government's brief in the New York case,[5] the Solicitor General brushes aside as generalities what two members of this Court deemed settled precedents and (3) in the government's briefs in the Alabama and Virginia cases, no reference is made to these principles at all, and the *MacDougall* case is not even cited.

[4] Brief for the United States as Amicus Curiae, pp. 85-86.

[5] Brief for the United States as Amicus Curiae, p. 25.

Acceptance of the propositions advanced by the Solicitor General necessarily entails a total rejection of existing law. Despite the studied attempt to ignore annoying—though governing—principles, it is still the law that nothing in the Equal Protection Clause denies a State the power to assure a proper diffusion of political initiative between its rural and urban communities, in view of the fact that the latter have practical opportunities for asserting their political weight at the polls not available to the former. It is thus manifestly permissible for a State to classify its political subdivisions upon the basis of their rural or urban character and so structure its legislature as "to assure that its smaller and less populous areas and communities are not completely overridden by sheer weight of numbers." *Baker* v. *Carr*, 206 F. Supp. 341, 345-346.

In Virginia, this is precisely what has been done. As pointed out in our opening brief, 20 of the 40 members of the Senate of Virginia represent urban areas of the Commonwealth, while 20 of the 40 members represent rural areas. Similarly, 48 of the 100 members of the House of Delegates of Virginia represent urban areas of the Commonwealth, while 52 of the 100 members represent rural areas. Nor does this balance between rural and urban areas stem from inclusion in the urban category of small cities not properly urban in character. See, Brief for the United States as Amicus Curiae, p. 42. Only two of the above-mentioned 20 Senators in the urban category represent areas not denominated standard metropolitan statistical area by the United States Department of Commerce. See, Defendants' Exhibit No. 11, p. XXXII. Moreover, while representatives in the House of Delegates of Virginia from the cities of Lynchburg, Charlottesville and Petersburg are considered urban representatives, by no stretch of the imagination can

it be said that these cities are not urban in character. The problems facing these cities are the same urban renewal, sewage disposal, air pollution and traffic control problems which confront such larger metropolitan areas as Richmond, Arlington, Fairfax and Norfolk; they are not the problems of rural electrification, farm price stabilization, soil conservation and drought relief with which rural areas are concerned.

A plan of reapportionment designed to achieve precisely such an accommodation was approved with respect to the bicameral legislature of Illinois. See, *Germano* v. *Kerner*, 220 F. Supp. 230. In Illinois, the lower house is apportioned on the basis of population while the upper house is structured on the basis of geographical areas without regard to population. Sustaining the validity of this method of apportionment against assault under the Equal Protection Clause, the United States District Court for the Northern District of Illinois declared (220 F. Supp. at 232-233, 235):

> "Plaintiffs' complaint alleges that the above discriminates against certain voters, particularly against those such as themselves who *live in metropolitan as opposed to rural areas*. This fact can hardly be denied. However, I am of the opinion that *these conditions do not constitute*, as contended by plaintiffs' complaint, *even an unreasonable much less an invidious discrimination as prohibited by the Fourteenth Amendment*.
>
> * * *
>
> "* * * On the other hand we are considering a plan intended *to somewhat counter-balance the relative political powers of the urban and agrarian voters*. We are considering a plan intended to assure each group control in only one house of a bicameral legislature.
>
> * * *

"* * * The Act clearly was a compromise in order to settle, apparently satisfactorily to both sides, *some legislative equalization between voters in agrarian and rural areas on the one hand and urban or large city populations on the other.* In adopting this political and practical compromise, Illinois has done no more and no less in my opinion than to follow the example of the founding fathers in the Constitutional Convention at Philadelphia. Having recognized the necessity for protecting minority voting rights and local sovereignty, the founding fathers adopted the system still in use providing for the election of our bicameral Congress. As in Illinois, election to the upper house is based on geographical area, or if you will, a weighted voting system. Election to the lower house is based on population similar to Illinois. Should that which is deemed proper when observed in the presence of the federal government be suddenly deemed improper when associated with a sovereign State? Must the subject be more royal than the king? Must the State be more democratic than the United States?

* * *

"In my opinion the Illinois system wherein one house of a bicameral legislature is not apportioned on a population basis, but rather, is apportioned with a definite and not irrational or capricious intention in mind of *balancing the divergent political interests of the state's large metropolitan area against the interests of the primarily rural 'down-state' area, does present a reasonable plan.* Further, this plan does in fact permit a reasonable, not a capricious or absurd, check upon the political power of the largely populated urban area. * * *" (Italics supplied)

As the *per capita* principles of the Solicitor General are divorced from law, so is attempt to combat appellants' contention that it is permissible to exclude military related

population in determining the number of inhabitants of a House or Senate district for the purpose of representation in the General Assembly of Virginia is divorced from the well known facts of contemporary life. In this connection, it is initially significant that the Solicitor General does not undertake to controvert the assertion of appellants that such military related population is fundamentally transient in nature, possesses a high mobility rate and is essentially non-citizen in character.[6] Indeed, his entire argument that the exclusion in question would constitute an invidious discrimination against such population *per se* is tucked away in a footnote[7] and amounts to no more than the naked statement that the above-mentioned characteristics of such population do not provide a valid basis for the exclusion.

Equally unsuccessful is the attempt to condemn the exclusion under consideration by the statement that the policy of Virginia, as evidenced by her election laws, actually favor military personnel. See, Brief for the United States as Amicus Curiae, p. 34. This observation is demonstrably inaccurate. Far from favoring military personnel as such, the Constitution and laws of Virginia expressly exclude from the right of suffrage any member of the armed forces whose residence in Virginia is occasioned solely by reason of his being stationed there. Section 24, Constitution of Virginia (1902); Section 24-19, Code of Virginia (1950). Thus, the policy of Virginia as evidenced by her election

[6] In Appendices III and IV of this brief, appellants have set out certain of the evidence adduced in the case of *Tyler* v. *Davis* in the Circuit Court of the City of Richmond supporting these characteristics of military related population. While such evidence is no part of the record in this case, it is indicative of the general character of the evidence by which appellants' description of such population may be supported.

[7] Brief for the United States as Amicus Curiae, pp. 38-39, footnote 18.

laws does not favor military personnel generally; it favors only those members of the military forces who are residents of Virginia other than by reason of their military assignments. Equally misleading is the declaration that military personnel who have been residents of Virginia for one year, residents of a county or city for six months and residents of a precinct for thirty days are entitled to vote. See, Brief for the United States as Amicus Curiae, p. 34. No such person is entitled to vote in Virginia unless his satisfaction of the residence requirements stems from some cause other than compliance with military orders.

On the basis of an additional publication of the United States Department of Commerce, Bureau of the Census, which he has filed with the Clerk of this Court, the Solicitor General has compiled Appendix B to the government's brief entitled "Military Populations of Counties and Independent Cities." See, Brief for the United States as Amicus Curiae, pp. 59-65. The tabulation in question reveals that only ten of the various counties and cities of Virginia have military populations in excess of 1,000 persons. These ten political subdivisions and the military population of each is revealed in the following summary:

Arlington	11,376
Fairfax	16,693
Prince George	5,326
Prince William	7,239
Princess Anne	9,544
Newport News	8,695
Norfolk	44,381
Portsmouth	10,522
Hampton	6,379
Alexandria	3,741

The substantial diminution in population variance ratios and variations from the average population per Senator and Delegate occasioned by the exclusion of military related population in determining the number of inhabitants in the relevant Senate and House districts is disclosed by the following tables, which are drawn from Defendants' Exhibits Nos. 7 and 8 (R. 275, 282) and the figures contained in Appendix B to the government's brief:

TABLE A

Senate District	Total population per Senator as shown by Defendants' Exhibit No. 7 (R. 275)	Total population less 2½ times military forces per Senator
1. Accomack (1) Northampton Princess Anne Virginia Beach	132,819	105,501
2. Norfolk City (2)	152,434	97,460
5. Prince George (1) Greenville Surry Sussex Hopewell	72,951	58,734
9. Arlington (1)	163,401	134,961
28. Prince William (1) King George Lancaster Northumberland Richmond County Stafford Westmoreland	111,059	91,074

Senate District	Total population per Senator as shown by Defendants' Exhibit No. 7 (R. 275)	Total population less 2½ times military forces per Senator
30. Newport News (1) York	135,245	109,368
36. Alexandria (1)	91,023	81,671
10. Portsmouth (1)	114,773	88,468
27. Fairfax (2)	136,337	115,128
31. Hampton (1)	89,258	73,061
Average per Senator (total population)	99,174	
Average per Senator (after deducting 2½ times military forces)		90,856

TABLE B

House District	Total population per Delegate as shown by Defendants' Exhibit No. 8 (R. 282)	Total population less 2½ times military forces per Delegate
56. Princess Anne Virginia Beach (2)	42,609	29,297
50. Norfolk (6)	50,811	32,487
55. Prince George Surry (1) Hopewell	44,385	30,178
9. Arlington (3)	54,467	44,987
57. Prince William (1)	50,164	32,067
40. Newport News (3)	37,887	30,641
5. Alexandria (2)	45,511	40,835
54. Portsmouth (2)	57,386	44,234
27. Fairfax, etc. (3)	90,891	76,752

House District	Total population per Delegate as shown by Defendants' Exhibit No. 8 (R. 282)	Total population less 2½ times military forces per Delegate
26. Hampton (1)	89,258	73,061
Average per delegate (total population)	39,669	
Average per Delegate (after deducting 2½ times military forces)		36,342

A canvass of Table A discloses that, with the exclusion of military related population, only two of the Senate districts in question contain populations which vary more than 25% from the average population per Senator. These are District 9 (Arlington County) which has a population approximately 50% more than the average, and District 5 (Prince George, etc.) which has a population approximately 40% less than the average. Reference to Table B discloses that only two of the House districts in question have populations which exceed 25% of the average population per Delegate. These are District 27 (Fairfax, etc.) and District 26 (Hampton), each of which has approximately twice as many inhabitants as the average per Delegate.[8]

So far as the city of Norfolk is concerned, even the Solici-

[8] The Solicitor General asserts (Brief, p. 39, footnote 17) that the population variance ratio between the most overrepresented House district (Shenandoah County) and Fairfax County, Fairfax City and Falls Church, after exclusion of military related population, is 3.71 to 1 rather than 3.53 to 1 as stated by appellants. The Solicitor General's assertion is based upon his utilization throughout the government's brief of the figure of 285,194 as the population of Fairfax County, Fairfax City and Falls Church. As indicated by Defendants' Exhibit No. 7 (R. 279, 281), the correct population figure for Fairfax County, Fairfax City and Falls Church is 272,674, which gives rise to a population variance ratio of 3.53 as stated by appellants.

tor General is compelled to admit that exclusion of military related population effects a "significant change" in the applicable figures for that city. See, Brief for the United States as Amicus Curiae, p. 37. Indeed, the figures contained in the tables set out above, which are precisely those contained in the tables set out on pages 36 and 38 of the government's brief and drawn from Appendix B to the government's brief, disclose that—with military related population excluded—Norfolk is only slightly overrepresented in the Senate (having a population of 97,460 inhabitants per Senator compared to the average population of 90,856 inhabitants per Senator) and *is actually overrepresented in the House of Delegates* (having a population of only 32,487 inhabitants per Delegate compared to the average population of 36,342 inhabitants per Delegate). It is thus unarguably apparent that exclusion of military related population completely destroys all foundation for any claim that the reapportionment statutes under consideration effect invidious discrimination against the city of Norfolk.

With the exclusion of military related population, the Solicitor General is reduced to the following criticism of the Virginia system (Brief of the United States as Amicus Curiae, p. 37):

> "Using total population, minus 2½ times the number of military personnel, the three most overrepresented counties still have approximately twice the representation of Arlington and Fairfax. Twenty-two districts have over 1½ times the representation of Arlington, thirteen have over 1½ times the representation of Fairfax, and four have over 1½ that of Norfolk City."

Counsel for appellants submit that figures such as these do not begin to constitute "incommensurables of both mag-

nitude and frequency" which must exist before it can "be said that there is present an invidious discrimination." *Baker, supra* at 260. On the contrary, we submit that these figures disclose that the Solicitor General objects to the Virginia reapportionment system because it does not apply with mathematical nicety and results in some inequality, despite the admonition of this Court in *Morey* v. *Doud*, 354 U. S. 457, 463-464 that:

> *"A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality."* (Italics supplied)

Although he states that it is unnecessary to decide the question in any of the reapportionment cases currently pending before this Court, the Solicitor General has suggested in the various government briefs that if representation in one house of a bicameral legislature is based upon population, representation in the other house may be based upon political subdivisions in recognition of the justification of giving independent political entities a voice in the legislative process. In Virginia, implementation of this scheme would entail making minor changes in the structure of Senate districts and increasing from 100 to 132 the maximum membership permissible in the House of Delegates so that each independent subdivision of the Commonwealth could be accorded one seat in the House. Under such plan, the population variance ratios between the five largest political subdivisions and the smallest political subdivision (Highland County) would be 68.3 to 1 for Fairfax County; 68.1 to 1 for Richmond City; 60.3 to 1 for Norfolk City; 41.9 to 1 for Arlington County and 36.2 to 1 for Henrico County. Manifestly, adoption of the method of apportionment sug-

gested as permissible by the Solicitor General would inordinately expand the maximum population variance ratios over those which exist under the current reapportionment, would greatly increase the magnitude and frequency of the incommensurables of reapportionment, would significantly lower Virginia's enviable position (8th) as compared to other States on the index of fairness of representation and would constitute a far more egregious departure from the basic *per capita* principle advanced by the Solicitor General than does the existing reapportionment.

With two observations of the Solicitor General, however, counsel for the appellants do not disagree. The first of these is set out in the government's compendious brief in the Maryland case (Brief for the United States as Amicus Curiae, p. 45) in the following language:

> "The Court is not to exercise the legislative function of choosing between alternatives; still greater deference may be due the people of a State when exercising the sovereign function of shaping their own governmental institutions. The postulates of federalism also argue that in this area the national judiciary must take care to allow full scope for local self-government."

To this extent the Solicitor General echoes the salutary admonition of Mr. Justice Holmes in *Bain Peanut Company* v. *Pinson*, 282 U. S. 499, iterated by the dissenting judge in the court below (*Mann* v. *Davis*, 213 F. Supp. 577, 586) that:

> "We must remember that the machinery of government would not work if it were not allowed a little play in its joints."

See, also, *Jackman* v. *Bodine*, 78 N. J. Super. 414, 188 A. (2d) 642, 651; *Levitt* v. *Maynard*, 104 N. H. 243, 182 A. (2d) 897, 900.

The second observation of the Solicitor General with which counsel for appellants are in complete accord is that contained in the government's brief in the case at bar (Brief for the United States as Amicus Curiae, p. 9), in which the end result of the Virginia reapportionment system is summarized in the following language:

> "The evidence also showed that measured simply by the percentage of the population required to elect a majority in each House of the legislature, *Virginia ranks well up on the list of well-apportioned States."*[9] (Italics supplied)

And so it does. As a matter of fact, Virginia ranks 8th in the United States in fairness of representation, based solely upon population figures which *include* military related population, subsequent to the enactment of the challenged redistricting statutes. Significant in connection with this fact is the failure of the Solicitor General, or any of counsel for the appellees, to suggest to this Court any escape from the dilemma which invalidation of the Virginia reapportionment system would entail. The scope of that dilemma may be emphasized by the following question:

> If a State reapportionment system which (1) strikes an almost perfect balance between rural and urban representation (2) gives rise to no population variance ratio which exceeds that of the Electoral College of the United States and (3) causes a State to rank 8th in the United States in fairness of representation based solely upon population, offends the Equal Protection Clause

[9] The Solicitor General (Brief, p. 9) initially states that it requires just under 40 per cent of the population to elect majorities in both the Senate and House of Delegates of Virginia. However, he later correctly points out that 41.1 per cent of the population elects a majority in the Senate and 40.5 per cent of the population elects a majority in House of Delegates. See, Defendants' Exhibit 5 (R. 263, 264).

of the Fourteenth Amendment, how can the reapportionment system of any of the 42 other States which results in greater population variance ratios and less fairness of representation based solely on population receive the approbation of this Court?

CONCLUSION

For the foregoing reasons, counsel for appellants submit that the decision of the court below should be reversed and the cause remanded to the District Court with instructions to (1) dismiss the complaint on the merits or (2) in the alternative, to abstain from conducting further proceedings pending decision of the case of *Tyler* v. *Davis* by the Supreme Court of Appeals of Virginia.

Respectfully submitted,

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Attorney General of Virginia

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Richmond 19, Virginia

Attorneys for Appellants

PROOF OF SERVICE

I, R. D. McIlwaine, III, one of counsel for the appellants herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of November, 1963, I served copies of the within Reply Brief on Behalf of Appellants on the several appellees herein by mailing same in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record as follows: Edmund D. Campbell, Esquire, Southern Building, Washington, D. C.; E. A. Prichard, Esquire, 106 N. Payne Street, Fairfax, Virginia; Sidney H. Kelsey, Esquire, 1408 Maritime Tower, Norfolk, Virginia; Henry E. Howell, Jr., Esquire, 808 Maritime Tower, Norfolk, Virginia; and Leonard B. Sachs, Esquire, Citizens Bank Building, Norfolk, Virginia.

.....

Assistant Attorney General

APPENDIX I

CIRCUIT COURT
OF THE
CITY OF RICHMOND

RICHMOND, VIRGINIA

September 19, 1963

Henry E. Howell, Jr., Esquire
Suite 808 Maritime Tower
Norfolk 10, Virginia

Robert Y. Button, Esquire
Attorney General of Virginia
Supreme Court Building
Richmond, Virginia

Henry T. Wickham, Esquire
State Planters Bank Building
Richmond 19, Virginia

RE: *N. P. Tyler and L. A. Jett, Jr.* v. *Levin Nock Davis, et al.*

Gentlemen:

This cause is now before this Court on transfer from the Circuit Court of the City of Norfolk which sustained the defendants' Motion to Dismiss for want of jurisdiction on the ground that the exclusive jurisdiction of such matters rested in this Court.

The plaintiffs who are residents and registered and qualified voters of the City of Norfolk and citizens of this Commonwealth and of the United States, instituted suit on behalf of themselves and other citizens similarly situated alleging

that Sections 24-12 and 24-14 of the Code of Virginia, as amended, reapportioning the Senate and House of Delegates in the General Assembly are violative of Section 43, Constitution of Virginia and of the Fourteenth Amendment of the United States Constitution in that such enactments effect invidious discrimination. The prayer of the Bill of Complaint for Injunction is that injunction should issue against the defendants to prohibit any elections—Primary or General—until such time as the General Assembly of Virginia convenes in Special Session and enacts legislation that will afford plaintiffs and others similarly situated fair and equal representation in said General Assembly.

The defendants who are members of the State Board of Elections of this Commonwealth and members of the Electoral Board of the City of Norfolk, filed their Answer denying that the challenged enactments are violative of either the Virginia or United States Constitution. In addition, the defendants filed their Cross-Bill alleging that the above Code sections, as amended in 1962, are valid enactments, infringe no rights secured to the plaintiffs under either constitutions and in no way effect invidious discrimination.

The question presented is whether or not Sections 24-12 and 24-14 of the Code of Virginia of 1950, as amended in 1962 (being Chapters 635 and 638, Acts of the General Assembly of Virginia, 1962), are violative of Section 43 of the Constitution of Virginia or of the Fourteenth Amendment of the United States Constitution.

Section 43 of the Constitution of Virginia reads as follows:

> "Apportionment of Commonwealth into senatorial and house districts. — The present apportionment of the Commonwealth into senatorial and house districts shall

> continue; but a reapportionment shall be made in the year nineteen hundred and thirty-two and every ten years thereafter."

No useful purpose would be served in setting forth the provisions of Sections 24-12 and 24-14 of the Code of Virginia.

If the only question was the regularity of reapportionment pursuant to Section 43 of the Virginia Constitution the issue could be quickly resolved as the Virginia Legislative history of reapportioning since 1900 is exemplary.

Since 1900 the House of Delegates has been reapportioned by the following acts: Acts of 1906, p. 84; Acts of 1910, p. 9; Acts of 1922, p. 463; Acts of 1923, p. 17; Acts of 1932, p. 337; Acts of 1942, chapt. 387; Acts of 1948, p. 803; Acts of 1952, Ex. Sess., chapt. 18; Acts of 1958, chapt. 33; and Acts of 1962, chapt. 638.

Since 1900 the Senate of Virginia has been reapportioned by the following acts: Acts of 1901-2, p. 800; Acts of 1922, p. 463; Acts of 1923, p. 17; Acts of 1934, p. 252; Acts of 1942, chapt. 387; Acts of 1948, p. 805; Acts of 1952, Ex. Sess., chapt. 17; Acts of 1958, chapt. 333; and Acts of 1962, chapt. 635.

Nor has the Supreme Court of Appeals of Virginia ever been reluctant to consider the issue of reapportionment. In 1884 in the case of *Wise* v. *Bigger*, 79 Va. 269, our Supreme Court had before it the validity of an act to apportion the representation of the State of Virginia in the Congress of the United States. However, the constitutionality of the Act was not in issue but merely the question of whether the Senate bill passed that body by a constitutional vote of two-thirds. In passing, however, the Court said at page 282 of 79 Va.:

> "* * * The laying off and defining the congressional districts is the exercise of a political and discretionary

power of the legislature, for which they are amenable to the people, whose representatives they are."

Again in 1932 in the case of *Brown* v. *Saunders*, 159 Va. 28 our Supreme Court held invalid an Act of the 1932 General Assembly reapportioning representatives to Congress and required the electors in the State at large to select nine members to represent the State in the National Legislature. In commenting on the duty of the General Assembly to divide the State into proper districts the Court said that it was, in a sense, political and that necessarily wide discretion is given to the legislative body. The principle of practical equality of representation was alluded to. At page 43 and 44 of 159 Va., Justice Hudgins (later to become Chief Justice) stated:

"Mathematical exactness, either in compactness of territory or in equality of population, cannot be attained, nor was it contemplated in the provisions of Section 55. The discretion to be exercised should be an honest and fair discretion, the result revealing an attempt, in good faith, to be governed by the limitations enumerated in the fundamental law of the land. No small or trivial deviation from equality of population would justify or warrant an application to a court for redress. It must be a grave, palpable and unreasonable deviation from the principles fixed by the Constitution. No exact dividing line can be drawn."

The above standards of approach may well be the proper ones, or a better approach to the more recent standard of "invidious discrimination" applied in the three-Judge federal Court in *Sanders* v. *Gray* (Ga. 1962) 203 F.S. 156, where at page 168 it adopted the definition of invidious as contained in Webster's International Dictionary:

"1. Tending to excite odium, ill will, or envy; likely to give offense, esp. unjustly and irritatingly discriminating; as invidious distinctions."

In accordance with the basic rules of constitutional law underlying court review of legislation assailed as unconstitutional there has always been a presumption in favor of a legislative classification and of the reasonableness and fairness of legislative action to the extent that if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. Further, the burden of establishing the unconstitutionality of a statute rests on him who assails it. Text authorities recognize this. 12 Am. Juris. 214, Section 521. The above principles have been long recognized in the Virginia law. See *Dean* v. *Paolicelli*, 194 Va. 219, 227, citing numerous other Virginia authorities. The Supreme Court of the United States has many recent pronouncements agreeing with the above principle, namely, *McGowan* v. *Maryland*, 366 U. S. 420, 425; *MacDougall* v. *Green*, 335 U. S. 281; *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584, and the same principles have been applied in reapportionment cases both in the Federal and State Courts. See *Baker* v. *Carr*, supra (Justice Stewart's concurring opinion at page 265 of 369 U. S.); *Maryland Committee etc.* v. *Tawes*, 180 A. (2d) 656, 668; *Jackman* v. *Bodine*, 188 A. (2d) 642, 647.

Since *Baker* v. *Carr*, supra, both State and Federal Courts have had occasion to consider cases alleging reapportionment or redistricting systems were unconstitutional.

One large group of cases holding reapportionment acts unconstitutional will now be summarized by style of case, citation, population variance ratio, p.v.r., in both House and Senate and characterization by each Court of the particular reapportionment.

Case	p.v.r. House	p.v.r. Senate	Characterization by Court
Sims v. *Frink* (Ala.) 208 F. S. 431	15-1	20-1	
Lisco v. *McNichols* (Col.) 208 F. S. 471	8-1	7-1	gross & glaring disparities
Sincock v. *Duffy* (Del.) Decided Apr. 17, 1963	35-1	21-1	disparities of a startling nature
Toombs v. *Fortson* (Ga.) 205 F. S. 248	98-1	40-1	great & gross disparities, discrimination so excessive as to be invidious
Harris v. *Shanahan* Dist. Ct., Shawnee Co. Kansas, No. 90976	8-1	19-1	
Davis v. *Synhorst* (Iowa) F. S. May 3, 1963	18-1	9-1	severe inequalities
Scholle v. *Hare* (Mich.) 367 Mich. 176, 116 N. W. (2d) 350		12-1	
Moss v. *Burkhart* (Okla.) 207 F. S. 885	14-1	26-1	grossly and egregiously disproportionate ratios
Sweeney v. *Notte* (R.I.) 183 A. (2d) 296	22-1		grossly unequal and sharply disproportionate representation
Mikell v. *Rousseau* (Vt.) 183 A. (2d) 817		6-1	
Thigpen v. *Meyers* (Wash.) 211 F. S. 826	4.65-1	7.25-1	

Another large group of cases holding reapportionment acts constitutional, usually *on their merits*, will now be summarized by style of case, citation, population variance ratio, p.v.r., in both House and Senate and characterization by each Court of the particular reapportionment.

Case	p.v.r. House	p.v.r. Senate	Characterization by Court
Sobel v. *Adams* (Fla.) 208 F. S. 316	21.7-1	62.4-1	- - - -
Caesar v. *Williams* (Idaho) 371 P. (2d) 241	18-1	- - -	- - -
Maryland Committee etc v. *Tawes* (Maryland) 184 A. (2d) 715	5-1	32-1	- - -
Jackman v. *Bodine* (N.J.) 188 A. (2d) 642	- - -	19-1	- - -
W.M.C.A. Inc. v. *Simon* (N.Y.) 208 F. S. 368	14.7-1	3.96-1	- - -
Nolan v. *Rhodes* (Ohio) ..... F. S.	- - -	- - -	- - -

The population variance ratios of the above analyzed cases should be kept in mind in considering the evidence in the instant case which will show that in Virginia the population variance ratio with respect to the House of Delegates is 4.36 to 1 and the same ratio with respect to the Senate is 2.65 to 1, which ratios rank Virginia as the eighth best of all the fifty states in the United States and well within the population variance ratio of 4.4 to 1 in the Electoral College.

Since the gravamen of plaintiffs' claim of the unconsti-

tutionality of the Virginia statutes and the plaintiffs' proof is predicated almost exclusively upon a numerical disparity of population, we should next examine those cases other than those already cited from Virginia to determine what legal principles and criteria exist.

MacDougall v. *Green*, supra, which was quoted with approval in *Baker* v. *Carr*, supra, contained the following language:

> *"To assume that political power is a function exclusively of numbers is to disregard the practicalities of government.* Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. *It would be strange indeed, and doctrinaire, for this Court*, applying such broad constitutional concepts as due process and equal protection of the laws, *to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses*, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. *The Constitution—a practical instrument of government—makes no such demands on the States.*" (Italics supplied).

In *Baker* v. *Carr*, supra, at pages 244, 245, 258 and 260 the United States Supreme Court made reference to the following:

> "The traditional test under the Equal Protection Clause has been whether a State has made *'an invidious discrimination,'* as it does when it selects 'a particular race or nationality for oppressive treatment.' . . . *Universal equality is not the test; there is room for weighting.*
>
> * * *

> *"No one . . . contends that mathematical equality among voters is required by the Equal Protection Clause.*
>
> * * *
>
> "Moreover, *there is no requirement that any plan have mathematical exactness in its application.* Only where, . . . the total picture reveals incommensurables *of both magnitude and frequency* can it be said that there is present an invidious discrimination." (Italics supplied)

In *W.M.C.A., Inc.* v. *Simon* (N.Y.) supra, at pages 384-385 the federal District Court in noting that there were other criteria for apportioning besides population quoted the following with approval from *Baker* v. *Carr*: . .

> " 'Nothing in the federal constitution [stops] a State from choosing a legislative structure it thinks is best suited to the *interests, temper,* and *customs of its people. . .*" (Italics supplied).

In *Sobel* v. *Adams* (Fla.) supra, the three-Judge federal District Court at page 321 stated the following:

> "It is our considered view that the rationality of a legislative apportionment may *include a number of factors in addition to population.*" (Italics supplied).

In *Thigpen* v. *Meyers,* 211 F. S. 829, the Court recognized the following factors:

> "Population is one of several important factors in apportionment. The *varying interests of an area, including economic elements of topography, geography, means of transportation and industrial, agricultural and resort activities, together with numerous other regional characteristics, are to be considered. . .*" (Italics supplied).

In *Mann* v. *Davis* (Va.) 213 F. S. 577, 584, considerations other than population were quoted in the following language:

> "While predominant, population is not in our opinion the sole or definitive measure of districts when taken by the Equal Protection Clause. *Compactness and contiguity of the territory, community of interests of the people, observance of natural lines, and conformity to historical divisions, such as county lines, for example, are all to be noticed in assaying the justness of the apportionment.*" (Italics supplied).

The plaintiffs' evidence consisted of the deposition taken August 28, 1962, of Ralph Eisenberg and plaintiffs' Exhibits 1 through 18 received by stipulation at the trial on June 5, 1963, and the testimony of Colonel James W. Roberts (Record pages 18 through 25). Dr. Eisenberg was primarily concerned with a districting arrangement which most nearly approximated an ideal scheme, namely, one which would have the least amount of deviation from the ideal (population) size of districts throughout the State and hence one least concerned with the preserving of existing districts. (Deposition p. 15). However, the guiding lines given to Dr. Eisenberg from the Hoover Commission had included use of counties and cities as basic units for representation, the non-division of counties and cities in constructing districts, economic and cultural interests, compactness, and contiguous districts. (Deposition page 8 and 9). Plaintiffs' exhibit No. 1 introduced through Dr. Eisenberg revealed that the Dauer and Kelsay study had revealed that Virginia's 1952 Apportionment Act displayed a high degree of representativeness measured by their standards and ranked Virginia sixth highest among the States in the percentages necessary to elect the majority in lower house and ninth

among State upper chambers. This was characterized as an impressive comparative position.

Plaintiffs' exhibit No. 2 introduced through Dr. Eisenberg who was responsible for the writing of said exhibit, recognized the virtual impossibility of achieving perfect equality in construction of legislative districts, qualified the term "as nearly as practicable" as not completely meaningful, stated that there is no simple answer to the question of how much deviation can be permitted and recognized the following standards in addition to population: compactness, contiguity, natural geographic or topographical features (waterways, peninsulas, mountain ranges, valleys), community of interests and integrity for boundaries of counties and cities.

Plaintiffs' exhibit No. 12 is a report of the (Hoover) Commission on Redistricting. At pages 6, 7, 8 and 18 of this exhibit there are listed the principles of redistricting given consideration by said Commission. At the bottom of page 7 of said exhibit the following is recognized:

> "The Constitution does not lay down specific requirements as to factors to be observed in redistricting the General Assembly. We have attempted to keep in mind in our plan the factors of compactness, contiguity, ease of access and communication, community of interest, and a reasonable degree of equality of representation. The map of Virginia and bare population data for the counties and cities, important as they are, do not indicate the other features which must be considered. We have endeavored to give due consideration to all factors in presenting the plans set out below.
>
> "It must be remembered that occasionally a district which may be under-represented in the House of Delegates may be over-represented in the Senate. Hence, the combined representation of the House and Senate

should be considered in determining the extent of over or under-representation in the area."

The defendants' evidence considered of testimony of Mrs. Leslie Curdts (Assistant General Registrar of the City of Norfolk), John L. Lancaster (Research Associate with the Bureau of Population and Economic Research at the University of Virginia), Dr. L. A. Thompson (Director of the Bureau of Population and Economic Research at the University of Virginia) and the defendants' exhibits 1 through 17.

Exhibit No. 7, the annual report of the Virginia ABC Board shows at page 48 the number of incorporated towns located in the various counties of Virginia. Defendants' exhibits No. 11 and 12 show the rank order of Virginia in comparison with other states based upon population before and after the 1962 reapportionment statutes indicating Virginia ranks eighth in the United States subsequent to the 1962 Reapportionment Act. Defendants' exhibits 13 through 16 compare the rural and urban representation in the Senate and House of Delegates of Virginia, indicating almost perfect balance between rural and urban areas.

Without even considering the position of the defendants that the military population should be excluded from the official 1960 census figures it is the opinion of this Court, and it so finds, that the evidence in this case viewed in the light of the legal principles heretofore stated clearly shows that an honest and fair discretion was exercised in good faith by the General Assembly in enacting Sections 24-12 and 24-14 of the Code of Virginia. It is the further opinion of this Court, and it further finds, that the population variance ratio of 4.36 to 1 in the House and 2.65 to 1 in the Senate, while not perfect, is in every way reasonable and is a far cry from invidious discrimination in the light of the afore-

mentioned legal and factual criteria for reapportionment. It follows therefore that Sections 24-12 and 24-14 of the Code of Virginia of 1950, as amended in 1962, do not violate either Section 43 of the Constitution of Virginia or the Fourteenth Amendment of the United States Constitution. Accordingly, the plaintiffs' prayer for injunctive relief is denied and the prayer of the cross bill filed by the defendants is granted.

Although it is in no way vital to the decision already reached in this case, it is the view of this Court that the defendants' position with regard to the deduction of the military related population from the official 1960 census figures was a justifiable approach by the 1962 General Assembly in the reapportionment of the State.

Section 24 of the Virginia Constitution which has direct bearing on this matter reads as follows:

> "Who not deemed to have gained legal residence.—No officer, soldier, seaman, or marine of the United States army or navy shall be deemed to have gained a residence as to the right of suffrage, in the State, or in any county, city, or town thereof by reason of being stationed therein; nor shall an inmate of any charitable institution or a student in any institution of learning, be regarded as having either gained or lost a residence, as to the right of suffrage, by reason of his location or sojourn in such institution."

The lack of activity of the military personnel in registering in the Norfolk area is covered by defendants' exhibit No. 1 and indicates the most minute percentage of registration by service personnel. Defendants' exhibit No. 5, Table No. 5, indicates that the military related population in Norfolk is slightly in excess of 100,000 or 32.85 per cent of the total population. With respect to Arlington it is in excess of

32,500 or 19.90 per cent of the total population. In Fairfax the figures are in excess of 49,000 or 18.85 per cent of the total population. It is quite obvious from the aforementioned figures that the deduction of the military related population substantially reduces the population variance ratio under consideration, particularly in the Norfolk area.

Counsel for the plaintiffs endeavors to refute the State's position as to the propriety of deducting military related population by calling on his excellent knowledge of historical documents. However, a careful analysis of citations furnished in his Reply Brief gives every indication that *voter* representation is intended by these authorities. For instance, he cites *Gray* v. *Sanders* (1963) 83 S. Ct. 801 at page 808 where it is stated in part:

> "* * * The idea that every *voter* is equal to *every other voter* in his state, when he casts his ballot in favor of one of *several competing candidates*, underlies many of our decisions." (Italics supplied).

It is obvious therefore that at all times a valid distinction can be made between voter representation of a stable area and population figures taken at a census to show pure population totals where the latter may encompass a marked percentage of shifting military related personnel which do not vote in the area.

Thus, adjusting its population figures to exclude military related population reveals that Norfolk has approximately 34,000 persons per Delegate and approximately 102,000 persons per Senator, compared to the "ideal representation" (by population) figures of approximately 36,000 and 90,000 respectively. Furthermore, the proper index figures for Norfolk are 1.06 for the House and .89 for the Senate, rather than 0.73 for the House and 0.61 for the Senate as

indicated by plaintiffs' exhibit No. 18. The above adjusted figures show that Norfolk is well within the abstract 25 percent tolerance suggested by the plaintiffs' witness Dr. Eisenberg.

It follows, and the Court so finds, that such a reapportionment does not constitute invidious discrimination and is in no way violative of plaintiffs' rights.

Counsel are requested to prepare, endorse and present an order in conformity with the views expressed herein.

Very truly yours,

(s) Edmund W. Hening, Jr.
Edmund W. Hening, Jr.
Judge

EWHJr:ft

APPENDIX II

IN THE CIRCUIT COURT OF THE
CITY OF RICHMOND VIRGINIA

October 11, 1963

In Chancery

N. P. TYLER, ET AL.,

Plaintiffs,

v.

LEVIN NOCK DAVIS, ET AL.,

Defendants.

FINAL ORDER

This cause came on to be heard upon the plaintiffs' bill of complaint for injunction, the answer and cross-bill of the defendants, the plaintiffs' answer to cross-bill, the exhibits and evidence *ore tenus* and the briefs and arguments of counsel for the parties.

Upon a consideration of all of which, the Court, having found the facts and reached the conclusions of law set forth in its letter-opinion of September 19, 1963, a copy of which has been filed and is herewith made a part of the record in this case, and being of opinion that Sections 24-12 and 24-14 of the Code of Virginia (1950), as amended, reapportioning the House of Delegates and Senate of the General Assembly of Virginia, are not violative of Section 43 of the Constitution of Virginia or the Fourteenth Amendment to the Constitution of the United States, it is

ADJUDGED, ORDERED and DECREED that the plaintiffs' prayer for injunctive relief be, and the same hereby is, denied and that the prayer of the cross-bill of the defendants for a declaratory judgment that the above-mentioned statutes are valid enactments of the General Assembly of Virginia which effect no invidious discrimination against the plaintiffs and the class they represent and infringe no rights secured to them and the class they represent by the Constitution of Virginia or the Constitution of the United States be, and the same hereby is, granted, to all of which plaintiffs object and note their exception.

A copy,

Teste: Luther Libby, Jr., Clerk, D.C.
by /s/ E. M. Edwards

APPENDIX III

DEFENDANTS' EXHIBIT No. 1

1959	
Total No. Registered in City of Norfolk as of December 31, 1959	78,010
No. Voters Registering from November Election Until December 31, 1959	64
No. Servicemen	0
1960	
Total No. Registered in City of Norfolk as of December 31, 1960	82,826
No. Voters Registering During 1960 (Presidential Election Year)	6,678
No. Servicemen	39
1961	
Total No. Registered in City of Norfolk as of December 31, 1961	80,766
No. Voters Registering During 1961	1,637
No. Servicemen	10
1962	
Total No. Registered in City of Norfolk as of December 31, 1962	70,046
No. Voters Registering During 1962	628
No. Servicemen	13
1963	
Total No. Registered in City of Norfolk as of April 1, 1963	63,923

No. Voters Registering Until June 1, 1963 1,044

No. Servicemen " " " " 7

No. Servicemen Voting by Affidavit

November 4, 1958 — 10
November 18, 1958 — 61
June 14, 1960 — 3

APPENDIX IV

DIRECT EXAMINATION

Q Dr. Thompson, would you state your name and your place of residence, please, sir?

A Loring A. Thompson. I live in Charlottesville, Virginia.

Q What is your profession, Doctor?

A I am Director of the Bureau of Population and Economic Research at the University of Virginia and Professor of Business Administration in the Graduate School of Business.

* * *

Q Have you also had occasion to extract from Defendant's Exhibit Number 3 certain tables relating to the characteristics of populations for selected area in Virginia?

A Yes.

Q Doctor, I hand you a document and ask you if that is the results of that compilation?

A That is right.

MR. MCILWAINE: May it please the Court, I should like to introduce this as Defendants' Exhibit Number 6.

* * *

THE COURT: Defendants' Exhibit 6.

Note: Defendants' Exhibit No. 6 was marked and filed with the Court.

Q (By Mr. McIlwaine) Doctor, would you tell us what this exhibit indicates and the source from which it was drawn?

A This material was prepared from what I think you call Exhibit 3.

Q Yes, sir.

A The PC(1) C48 Tables 32 and 35. And what I was interested in looking at there in these arrangements was the percentage of a population in 1960 that moved into its house after 1958 and the percentage of people in each subdivision that were residing—the percentage of people in each area who were living in the State in which they were born.

The first column across gives the state, which means for the state as a whole that 26.9 percent of the population of Virginia in 1960 had moved into the house they were living in on April 1, 1960 after 1958. And that of all the persons living in Virginia in 1960 there were 69.2 percent that were born in Virginia.

Now, in the metropolitan areas of the State—we used Lynchburg, Richmond, and Roanoke, and then used Arlington County, Fairfax County, Falls Church, the Norfolk and the urban fringe around Washington, D. C. And the percentages of persons moving into the house after 1958 is shown in each case. In Lynchburg, Richmond and Roanoke, the percentages are 23.5, 24.8 and 24.8 respectively.

In the list of Arlington, Fairfax, Falls Church, the City of Norfolk, and the urban fringe around Washington, the percentages except in Falls Church run 33.6 for Arlington, 33.6 for Fairfax, 37.6 for Norfolk, and around the urban fringe of Washington, D. C., it was 30.4. Falls Church is 25.5.

Now, that, to me, indicates—or to me that reflects the increased mobility of the populations in these areas with heavy defense concentrations. This, of course, is about what you would expect, because these people are transferred, and they move around. But there is a substantial difference in the stability of the population of the metropolitan areas in which the number of defense establishments is small and those in which it is relatively large.

Q Is that observation borne out also by the data in the second column?

A Yes, I think it is pretty well borne out by the data in the second column.

In the Lynchburg metropolitan area there are 86.2 percent of the people in that area that were born in Virginia. In Richmond, there were 74.6. In Roanoke 79.5. Now, in these areas of defense impaction like Arlington, there are 26.9. Fairfax, 35.3. Falls Church, 32.6. Norfolk, 46.0. And the urban fringe around Washington, 28.9.

* * *

Q So that for the metropolitan areas which you have listed here as Lynchburg, Richmond, and Roanoke, the figures which we have just adduced show that in those areas approximately 25 percent of the population moved into its present house in the year 1959-1960?

A That is right.

Q The same evidence which we have just adduced shows that for Arlington, Fairfax and Norfolk, some 33⅓ percent of the population had moved into its present house during the year 1959 and 1960?

A That is correct.

Q And this is a percentage increase or rate of turnover, is it, Doctor?

A Yes. It is a rate of turnover. It indicates the relative stability of your areas.

Q Are these figures used by members of the profession, Doctor, to show—are they relied upon to show stability and mobility relatively in various areas?

A That is right.

Q And on the basis of the figures we have adduced, Doctor, there is a greater rate of turnover in Arlington, Fairfax and Norfolk than there is in Lynchburg, Richmond and Roanoke?

A That is right.

Q And the rate of difference is some 40 to 50 percent?

A Yes. The difference would be probably around 40 percent higher turnover in these defense areas than in the other more stable and established areas.

Q And this evidence which we have just adduced from the Defendants' Exhibit 3 is consistent with the results as defined by you from Defendants' Exhibit 6?

A That is right.

Q Are these figures, Doctor, consistent with the figures adduced in Defendants' Exhibit 1 relating to the number of service men registered to vote in the City of Norfolk for the particular areas given. I believe you have a copy of Defendants' Exhibit 1?

A Yes.

I think it is reasonable to infer that the high mobility among the service people would result in a relatively small registration among them for voting in the local areas.